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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.470 OF 1987

1. Vijay Vishnu Gangurde)

2. Sanjay Vishnu Gangurde)

Both residents of Pimpalgaon)
Baswant, Taluka Niphad,)
District Nasik.)

(At present in Central Prison)
Nasik Road, District Nasik.)) ... Appellants
(Orig. Accused 2 & 11)

Versus

The State of Maharashtra) ... Respondents

Mr. Shirish Gupte with Mr. Harshad Palwe for the appellants (orig. accused 2 and 11).

Mr. B. H. Mehta, A.P.P. for the State.

ALONG WITH

CRIMINAL APPEAL NO.490 1987

Bhagwan Ratan Gangurde, age 28)
years, R/o. Pimpalgaon, Baswant)
Taluka Niphad, District Nasik.) ... Appellant
(Orig. Accused 4)

Versus

The State of Maharashtra) ... Respondents

Ms. Sharmila Kaushik, advocate appointed as per court's order dated 9/08/2004 for the appellant (orig. accused 4).

Mr. B.H. Mehta, A.P.P. for the State.

CORAM: SMT. RANJANA DESAI &
A.S. OKA, JJ.

DATED: 12TH OCTOBER, 2004.

ORAL JUDGMENT:- (**Per Smt. Ranjana Desai, J.**)

1. The present appeals involve same facts and identical contentions and, hence, it is advantageous to dispose them of by a common judgment and, hence, this common judgment.

2. The appellants in Criminal Appeal No.470 of 1987 (for convenience, "accused 2 and 11 respectively") and the appellant in Criminal Appeal No.490 of 1987 (for convenience, "accused 4") along with nine others (for convenience, "accused 1, 3, 5 to 10 and 12 respectively") were tried in Sessions Case No.19 of 1986 in the Sessions Court at Nasik. The accused were charged for the offences punishable under sections 147, 148, 302 read with sections 149, 302, 307, 326 and 324 of the Indian Penal Code (for short, "the IPC").

3. At the trial, the prosecution story was as follows. Accused 1 Vishnu and accused 3 Ratan are real brothers. Accused 2 Vijay, accused 10 Sahebrao and accused 11 Sanjay are the sons of accused 1 Vishnu, while accused 4 Bhagwan and accused 5 Sunil are the sons of accused 3 Ratan. Accused 12 Drupadabai is the wife of accused 1 Vishnu. Nirmala is her daughter. Being a juvenile offender, a separate charge-sheet was filed against Nirmala in juvenile court. PW-1 Gautam, PW-8 Vasant, PW-10 Prakash, PW-18 Shirish and Sham and Dinkar are real brothers. PW-12 Sangita is their married sister. PW-11

Indubai is the wife of PW-8 Vasant. Ramdas was their son. Dinkar resides with his wife and children at Chandwad while PW-8 Vasant resides with his wife and children at Pimpalgaon separate from rest of his brothers, who stay jointly with their parents, wives and children. The accused and the prosecution witnesses, except Dinkar, stay in the locality known as Rajwada at Village Pimpalgaon. It is inhabited by Hindu Boudha persons.

4. It is the case of the prosecution as made out in Ex-19, the complaint of PW-1 Gautam, that there was enmity between the prosecution witnesses on the one hand and the accused on the other, on account of some past disputes. According to the prosecution, on 2/10/1985, at about 9.00 p.m., PW-1 Gautam, PW-18 Shirish, PW-11 Indubai, PW-12 Sangita were in their house and were taking meals. At that time, accused 1 Vishnu, his wife accused 12 Drupadabai, his sons, accused 2 Vijay, accused 10 Sahebrao and accused 11 Sanjay, his daughter Nirmala, accused 4 Bhagwan, accused 5 Sunil, their father accused 3 Ratan came in front of their house and started abusing in filthy language. Therefore, PW-1 Gautam started going to the police station to file a complaint. When he came near Ganpati temple in village market at Pimpalgaon, the aforesaid persons came there with sticks, gupti and knives in their hands. They were also accompanied by accused 7 Anil, accused 6 Suresh, accused 8 Kailash, one Rajkumar and accused 9 Kamlesh. They started abusing

PW-8 Vasant, PW-10 Prakash and deceased Ramdas. Then deceased Ramdas was stabbed by accused 11 Sanjay with his knife on his stomach. There was a bleeding injury. PW-18 Shirish was then stabbed with knife by accused 2 Vijay. Accused 2 Vijay and accused 4 Bhagwan dealt gupti blows to PW-1 Gautam on his chest and stomach, causing bleeding injuries. PW-8 Vasant was then assaulted by all these persons. Accused 1 Vishnu and accused 2 Vijay dealt gupti blows on the stomach of PW-8 Vasant. The remaining persons gave kicks and fist blows. Accused 9 Kamlesh, accused 5 Sunil, accused 3 Ratan, accused 2 Vijay and accused 11 Sanjay assaulted PW-8 Vasant with knife and kicks. All of them were injured and lying at the place of incident. PW-10 Prakash somehow managed to reach the police station, but his condition was serious and, therefore, his statement could not be recorded. He was immediately shifted to the Civil Hospital, Nasik.

5. PW-14 Head Constable Jadhav was on patrolling duty on 2/10/1985 from 8.00 p.m. onwards. At about 10.00 p.m., when he was at Niphad Fata, one person informed him about the incident going on in Rajwada near village gate. He proceeded to that place and found that a crowd had gathered there and two injured persons were lying near Ganpati temple. He arranged to send those two injured persons to the dispensary at Pimpalgaon. He gave phone message about the incident to the police station officer. PW-19 ASI Gholap was present in Pimpalgaon police station. At about 10.30 p.m. he was asked by police

station officer to go to Rajwada as some incident had taken place. Accordingly, PW-19 ASI Gholap came there and found that PW-8 Vasant, his son deceased Ramdas, PW-10 Prakash and PW-18 Shirish were lying injured. He put them in a taxi and brought them to the dispensary at Pimpalgaon. The medical officer on duty advised immediate removal of these persons to the Civil Hospital, Nasik. Accordingly, they were shifted to the Civil Hospital, Nasik by PW-19 ASI Gholap. While admitting in the hospital, deceased Ramdas died.

6. PW-21 PSI Patil attached to the Pimpalgaon police station kept police guard at the scene of offence. At 12.00 midnight, he received a message about the death of deceased Ramdas in the hospital from police constable Pathan. PW-21 PSI Patil instructed Pathan to ask PW-19 ASI Gholap to record the complaint of any of the injured persons, who was in a position to speak. Accordingly, PW-19 ASI Gholap recorded the complaint of PW-1 Gautam, which is at Ex-19. It was sent to the Pimpalgaon police station for registering the offence. This complaint was brought by PW-15 police constable Panpatil at 6.15 a.m. on 3/10/1985. PW-21 PSI Patil then registered the offence. PW-20 ASI Gurhale came to the Civil Hospital, Nasik, at 3.00 p.m. and recorded supplementary statement of PW-1 Gautam and the statements of PW-18 Shirish and his brother Sham. He found that the other injured persons were not in a position to speak. On 4/10/1985, he recorded the statements of PW-11 Indubai, Sakhubai and

PW-12 Sangita, but he could not record the statements of the injured persons even on that day. Even on 5/10/1985, they were unable to speak.

7. During the course of investigation, panchnama of scene of offence was drawn. The accused were arrested. Their clothes were taken charge of. At the instance of some of the accused, some weapons were recovered. The accused were also examined to find out whether there were any injuries on their persons. Post-mortem was conducted on the corpse of deceased Ramdas. Prosecution witnesses were examined and their injury certificates were obtained. Operation was performed on PW-8 Vasant as his injury was serious. After completion of the investigation, the accused came to be charged as aforesaid.

8. In short, the case of the prosecution was that on account of past enmity, accused 1 to 12 formed an unlawful assembly with the common object of assaulting the aforesaid witnesses and attempting to commit their murder and in prosecution thereof, caused various injuries to the aforesaid witnesses and caused the murder of Ramdas Gangurde.

9. At the trial, the prosecution examined as many as 21 witnesses. Out of them, PW-1 Gautam, PW-8 Vasant, PW-10 Prakash and PW-18 Shirish are injured witnesses. PW-1 Gautam is the complainant. PW-11 Indubai and PW-12

Sangita are the eye-witnesses. PW-6 Dr. Ashtaputre had done post-mortem on the corpse of deceased Ramdas. PW-7 Dr. Savkar has examined some of the prosecution witnesses and accused 11 Sanjay and accused 12 Drupadabai. PW-9 Dr. Dey examined accused 2 Vijay. PW-16 Dr. Pawar had performed operation on PW-8 Vasant. The details of investigation have been given by PW-15 PC Panpatil, PW-20 ASI Gurhale and PW-21 PSI Patil.

10. The defence of the accused was one of denial. Accused 1 and 10 took up the defence of alibi. Accused 6, 9 and 10 stated that they are not concerned with the incident and they are falsely implicated. Accused 2, 11 and 12 were taking meals in their house with Nirmala when Dinkar came in front of their house and started abusing them. They, therefore, went to the police station and lodged a complaint against Dinkar. While they were returning from the police station, they came in front of the shop of Bhavsar, when Dinkar and his brothers surrounded and assaulted them. They raised hue and cry and because of that residents of Rajwada gathered there. They intervened and, therefore, the accused could escape and reach the police station. For this incident, accused 11 Sanjay had lodged a complaint. It is suggested by the accused that the residents of Rajwada assaulted the prosecution witnesses because they were harassing the females and children. It is because of this assault that the prosecution witnesses received injuries. The remaining accused stated that they were falsely

implicated due to enmity.

11. After perusing the evidence on record, the trial court held that the prosecution had failed to prove that accused 1 to 12 formed an unlawful assembly, the common object of which was to assault and commit murder of the prosecution witnesses. The learned Sessions Judge further held that accused 2 Vijay and accused 11 Sanjay committed murder by intentionally causing the death of deceased Ramdas in furtherance of their common intention. He further held that accused 2 Vijay and accused 11 Sanjay had attempted to commit murder of PW-8 Vasant and PW-10 Prakash. He further held that accused 2 Vijay and accused 11 Sanjay had voluntarily caused grievous hurt to PW-1 Gautam, PW-8 Vasant, PW-10 Prakash and PW-18 Shirish by sharp and cutting objects and accused 4 Bhagwan is proved to have caused grievous hurt to PW-10 Prakash by sharp and cutting object. The learned judge held the charge of criminal intimidation as not proved. He held that accused 2 Vijay and accused 11 Sanjay had committed offences punishable under sections 302, 207, 326 read with section 34 of the IPC and accused 4 Bhagwan is proved to have committed offence punishable under section 324 of the IPC. He came to the conclusion that the prosecution has failed to prove the charges against the other accused. In the circumstances, he convicted accused 2 Vijay and accused 11 Sanjay for the offences under section 302 read with section 34 of the IPC and sentenced them to suffer R.I. for life. For the offence

under section 307 read with section 34 of the IPC, each of them were sentenced to suffer R.I. for a period of seven years. No separate sentence is awarded for the offences punishable under sections 326 and 324 read with section 34 of the IPC. Accused 4 Bhagwan was sentenced to suffer R.I for one year for offence under section 324 of the IPC. He was acquitted of all the other charges. All the other accused were acquitted of all the charges levelled against them. Being aggrieved by this judgment and order accused 2, 4 and 11 have approached this court.

12. We have heard, at some length, Mr. Shirish Gupte and Mr. Palwe, the learned counsel appearing for accused 2 Vijay and accused 11 Sanjay, Ms. Sharmila Kaushik, advocate appointed for accused 4 Bhagwan and Mr. Mehta, the learned A.P.P. for the State. With the assistance of the learned counsel, we have gone through the entire evidence and other record.

13. Mr. Gupte and Mr. Palwe, the learned counsel appearing for accused 2 Vijay and accused 11 Sanjay contended that the prosecution has failed to prove its case against accused 2 Vijay and accused 11 Sanjay. Mr. Gupte contended that all the witnesses are interested witnesses and, hence, their evidence will have to be appreciated with caution. Their evidence is replete with major omissions and, hence, it does not inspire confidence. The learned counsel contended that whereas all the witnesses in the court wanted to suggest that

PW-18 Shirish came after deceased Ramdas and PW-10 Prakash had received injuries and fallen down, it is clear from the cross-examination of PW-18 Shirish that before the police he had given a completely contrary version. He had deposed about the assault on all the prosecution witnesses. The learned counsel submitted that this suggests that the prosecution has not come out with the entire truth. He submitted that the prosecution has suppressed the genesis of the case. So far as the assault on deceased Ramdas is concerned, the prosecution witnesses are not consistent. PW-8 Vasant, the father of the deceased had stated that he did not see where his son deceased Ramdas received injury. The learned counsel contended that it is inconceivable that PW-8 Vasant would not have seen where his son deceased Ramdas received injury. This makes the prosecution story shaky. The learned counsel further contended that in his evidence, PW-10 Prakash has admitted that he went to the police station after the incident and accused 2 Vijay and accused 11 Sanjay and some other accused were already there at the police station. However, his complaint was not recorded. In the opinion of the learned counsel, if PW-8 Vasant had reached the police station, the police ought to have recorded his statement. The fact that the police have not recorded his statement and accused 2 Vijay and accused 11 Sanjay were present in the police station suggests that the incident did not take place in the manner in which the prosecution wants us to believe it took place. The learned counsel further contended

that this is affirmed by the fact that the accused have also suffered injuries. Accused 12 Drupadabai has suffered a fracture. These injuries have not been explained by the prosecution. This also casts a shadow of doubt on the prosecution story. The learned counsel further submitted that there is a delay in recording the FIR, which also suggests the falsity of the case. It was further contended that the alleged discoveries of weapons, at the instance of the accused, are from open places, which are easily accessible to the public and, hence, the discoveries ought to have been discarded and the learned judge erred in placing reliance on them.

14. Mr. Palwe, the learned counsel added that the complainant has not clearly stated in the FIR that accused 2 Vijay assaulted the deceased. He further contended that all the witnesses have stated that deceased Ramdas received injuries on his stomach whereas deceased Ramdas had received injuries on his chest, which proved to be fatal and, therefore, assuming this court comes to the conclusion that the accused are responsible for them, the accused could be only convicted under section 304, Part II of the IPC. He submitted that this is further clear from the fact that all the accused did not come together and, therefore, the intention to commit murder or pre-planning can never be attributed to the accused. The learned counsel also drew our attention to the evidence of PW-21 Investigating Officer PSI Patil and PW-14 HC Jadhav, which according to him, show that at the

scene of incident, there was no light. He submitted that the lights were switched off and there was total darkness and, as such, the identification made by the prosecution witnesses is doubtful. Mr. Palwe also drew our attention to the evidence of PW-3 Pathare, who is pancha to panchnama, under which accused 2 is said to have discovered the weapon of assault. He submitted that the pancha has stated that he has only signed the panchnama. The pancha has not reproduced the statement of accused 2. Therefore, this pancha appears to be a got up pancha. The learned counsel also contended that PW-4 Baburao, who is pancha to panchnama, under which accused 11 is said to have discovered the weapon of assault, has stated in his evidence that he has acted as pancha previously on two to four occasions. The learned counsel contended that this pancha is a habitual pancha and, therefore, his evidence is doubtful and the same ought not to have been relied upon. In the circumstances, the learned counsel contended that the order of conviction and sentence deserves to be set aside and, in any case, offence under section 302 is not made out and, at the most, accused 2 Vijay and accused 11 Sanjay could be convicted only under section 304, Part II of the IPC.

15. Ms. Kaushik, the learned counsel for accused 4 contended that so far as accused 4 Bhagwan is concerned, there is hardly any evidence against him. She submitted that whereas some of the witnesses have stated that accused 4 Bhagwan was having gupti in his hand, PW-1

Gautam has stated that accused 4 was having gupti and stick in his hand. In the cross-examination, he has stated that accused 4 had a stick with him and he assaulted the prosecution witnesses with a stick. The learned counsel also pointed out from the evidence of PW-12 Sangita that though in the court she has stated that accused 4 was having a gupti when he assaulted deceased Ramdas, PW-8 Vasant, PW-1 Gautam and PW-18 Shirish, PW-10 Prakash, Dinkar and Shyam, she has not stated so in her police statement. The learned counsel further pointed out that whereas PW-18 Shirish has stated that accused 4 Bhagwan had a gupti, he has not stated so in his police statement. The gupti allegedly recovered at the instance of accused 4 has no blood stains. There were no blood stains on his clothes also. In the circumstances, the learned counsel submitted that accused 4 deserves to be acquitted.

16. Mr. Mehta, the learned A.P.P. has contended that the order of conviction and sentence be confirmed. He submitted that in the nature of things considering the manner in which the assault took place and other attendant circumstances, the prosecution witnesses cannot be expected to be consistent on all minor details. There are bound to be some inconsistencies in their evidence. That, however, does not make the prosecution story false. He submitted that all the witnesses are consistent so far as the role of accused 2 Vijay and accused 11 Sanjay is concerned. They are also consistent about the role of

accused 4 Bhagwan. The learned counsel contended that the delay in recording the FIR and the statements is properly explained by the prosecution. The evidence of PW-16 Dr. Pawar and PW-21 PSI Patil establishes the prosecution story that the witnesses were not in a position to make any statements due to the injuries suffered by them. Learned A.P.P. further contended that the discovery of weapons at the instance of the accused, has been rightly believed by the learned Sessions Judge. He pointed out that the clothes of the accused had blood stains. Relying on the decision of the Supreme Court in **State of Maharashtra v. Milind and others, 2000 AIR SCW 4303**, the learned A.P.P. contended that the injuries received by the accused are minor and, therefore, assuming that they are not explained, that will not have any adverse impact on the prosecution story. He urged that this court should not disturb the order of conviction and sentence.

17. We have given our anxious consideration to the submissions advanced by both sides. Before we deal with the rival submissions and the evidence, it is necessary to note that the prosecution has led some evidence to suggest that there were some disputes between the accused and the deceased. It appears that on account of the said disputes, the prosecution witnesses were holding a grudge against the accused. What seems to have really preceded the incident in question is the quarrel which took place between Dinkar and accused 11 Sanjay before the incident

in question. This is admitted by PW-12 Sangita in her evidence. However, even if it is accepted that the prosecution has failed to prove the motive, when there is consistent eye-witness account, the motive receeds in the background. The evidence adduced in this case will have to be appreciated keeping this in mind.

18. In order to appreciate the circumstances under which the assault on the prosecution witnesses took place and the seriousness of the incident, it would be necessary to first have a look at the medical evidence. PW-6 Dr. Ravindra Ashtaputre had done post-mortem on the corpse of deceased Ramdas. PW-6 Dr. Ashtaputre found the following external injuries.

"1. Punctured wound on chest right side 2" lateral and little above the right niple size 1" x 1/2" x 5".

2. Punctured wound on abdomen on left lumber region 1/2" x 1/2" x 1".

3. Punctured wound on back of left elbow 1" x 1/2" x muscle deep, muscle exposed.

4. Superficiely incised wounds on left palm, near left thung index finger and middle finger."

He found the following internal injuries on the corpse of deceased Ramdas.

> "Brain was pale. Thorax-there was fracture of 3rd rib below injury No.1. There was tear of right pluera below injury No.1 corresponding to external injury No.1. There was punctured wound on right lung 1/2" in depth corresponding to injury No.1. There was heaemothorax-left lung was pale."

19. According to PW-6 Dr. Ashtaputre, these injuries were sufficient to cause death in the ordinary course of nature particularly injury no.1. When Muddemal article 32, 33 and 34 were shown to him, PW-6 Dr. Ashtaputre stated that the external injuries could be caused by any one of these weapons. The cause of death, according to PW-6 Dr. Ashtaputre, was shock due to internal haemorrhage due to rupture of lung.

20. PW-7 Dr. Vishwas Savkar was attached to the Civil Hospital, Nasik as Medical Officer. On 3/10/1985 at 12.45 p.m. he examined PW-18 Shirish PW-8 Vasant, PW-10 Prakash, PW-1 Gautam. He found the following injuries on the person of PW-18 Shirish.

"(i) Incised wound in right hypochondria region 3 cm. above costal region costal margin 1.5 cm. x 0.5 cm. 0.5 cm. muscile deep

(ii) Incised wound in left second inter costal region starting from parasternal line laterally 1.5 cm. x 0.5 cm. x 0.5 cm.

(iii) Contused Lacerated Wound on frontal region 4 cm. x. 0.5 x 0.5 cm. skin deep placed in anterioposterior direction. All the injuries were within 24 hours. Injury No.1 and 2 caused by sharp and cutting object while Injury No.3 caused by hard and blunt object."

He issued the certificate, which is at Ex-46.

He found the following injuries on the person of PW-8 Vasant.

"(i) Incised wound 2 cm. x 0.5 cm. x 1 cm. muscle deep opening in peritoneum in right hypohondreum 3 cm. above costal margin.

(ii) Incised wound 2.5 cm. x 0.5 cm. x 1 cm. in right hypochondreum region 3 cm. below costal margin. (iii) Incised wound 1.5 cm. x 0.5 cm. x 1 cm. in left lumber region 5 cm. away from umbilicus."

He issued the certificate, which is at Ex-47.

21. PW-7 Dr. Savkar stated that PW-8 Vasant was an indoor patient till 1/11/1985. On the same night for abdominal injury at sr.nos.1 and 2, he was referred to surgeon PW-16 Dr. Pawar who performed operation on him. PW-16 Dr. Pawar found huge tear on liver which could not be sutured. Therefore, the liver was packed by jealfoam and external injury was sutured. He further stated that the said wound was dangerous and if medical aid was not given in time, it would have proved fatal. PW-7 Savkar also examined PW-10 Prakash. He found the following injuries on him.

"(i) Incised wound 1" x 1/4" x skin deep at T-12-L-1 left side i.e. thoracic and lumber first vertebra.

(ii) Incised wound at the same level above 4" x 1/2" x 1/4" muscle deep right side.

(iii) Scalp wound 2" x 1/4" x skin deep over frontal region.

(iv) Incised wound 1/2" below superior illiae spine on the right side 1/2" x 1/4" x skin deep."

He issued the certificate, which is at Ex-48.

22. PW-7 Dr. Savkar also examined PW-1 Gautam. He found the following injuries on him.

"(i) Incised wound right third inter costal space 8 cm. away from parasternal line 1 cm. x 0.25 cm. x 0.25 cm.

(ii) Incised wound right forth inter costal space on parasternal line 0.5 cm. x 0.25 cm. x 0.25 cm. x skin deep.

(iii) Incised wound in left hypochondereum region 2 cm. x 1 cm. x 0.5 cm.

(iv) Incised wound 0.5 cm. x 0.5 cm. x 0.25 cm. in midauxillary line in 8th inter costal space."

He issued the certificate, which is at Ex-49.

23. On 2/10/1985, he also examined accused 11 Sanjay and he found the following injuries on him.

"(i) C.L.W. scalp left parital, oblique 2" x 1/4" scalp deep.

(ii) Contusion on right side back T-12-L-1 level 2" x 1 1/2"

(iii) Contusion left side back T-12-L-1 level 2 1/2" x 1/2"

(iv) Contusion left shoulder 1/2" x 1"

(v) Contusion right shoulder 1 1/2" x 1".

He stated that these injuries could be caused by hard and blunt object. He further stated that accused 11 Sanjay was admitted and discharged on 4/10/1985 itself.

24. PW-7 Dr. Savkar also examined accused 12 Drupadabai. He found following injuries on her.

"(i) C.L.W. left parital region scalp 4 1/2" x 1 1/2" scalp deep.

(ii) C.L.W. left forearm 1" x 1/3" by skin deep.

According to him, X-ray of right forearm of accused 12 Drupadabai was taken and the same disclosed fracture of ulna upper 1/3rd. He stated that the injuries could be caused by hard and blunt object. He further stated that accused 12 Drupadabai was admitted and discharged on 9/10/1985 itself.

25. PW-9 Dr. Dey, the Medical Officer at the Primary Health Centre, Pimpalgaon, examined accused 2 Vijay on 3/10/1985 at 3.05 p.m. He found following injuries on accused 2 Vijay.

"(i) Oblique lacerated wound of 1/4 x 1/2" x muscle deep over posterior surface of left fore arm at upper 1/3rd with blood clots.

(ii) Oblique abrasion of 1/2 x 1/4" over posterior surface of left arm at lower half.

(iii) Six small abrasions over right scaupula on pole.

(iv) One obliqur bruise of 4" x 1/2" over left scapular.

(v) One obliqur bruise of 2 x 1/2" over muscle right bieds.

26. This medical evidence shows that serious and grievous injuries were received by the prosecution witnesses, which could, as per doctor's evidence, be caused by sharp and cutting weapons and relatively minor injuries were received by the accused.

27. At this stage, it will also be necessary to see the position of light. In the panchnama of scene of offence, existence of electrical pole is stated. It is argued by the learned counsel for the appellants, on the basis of the statement of PW-21 PSI Patil and PW-14 Jadhav, that the lights were switched off and, hence, there was no visibility. We are unable to accept this submission for it is not clear from the testimony of these witnesses as to which lights were switched off. It is also significant to note that PW-14 Jadhav had gone to the scene of offence after the incident was over. Therefore, whether the lights were switched off at the relevant time when the incident had taken place is not clear from his evidence. Besides the evidence of PW-21 PSI Patil also does not take the defence story any further because he has stated in his evidence that on 3/10/1985 he had only made enquiries from Village Panchayat, Pimpalgaon, whether there were electric lights at the place of

incident and those were working. He has further stated that he himself did not operate the switch to see whether the electric light was glowing. There is no positive statement made by the prosecution witnesses that there were no lights. It is also pertinent to note that admittedly, the accused and the prosecution witnesses are known to each other. They are from the same village. There is enmity between the two sides and the nature of injuries sustained by the prosecution witnesses suggests that the accused must have inflicted the injuries on the prosecution witnesses from close quarters. Therefore, in our opinion, there will be no question of mistaken identity particularly when the panchnama of the scene of offence mentions the existence of an electric pole and there is nothing to suggest that this electric pole was not in working condition. This submission of the learned counsel must, therefore, fail.

28. We are also not impressed by the submission of the learned counsel that the evidence led by the prosecution should be discarded because the prosecution witnesses are interested witnesses. There is no rule that the evidence of interested witnesses, in all cases, will have to be discarded. If the evidence is found to be consistent and cogent, it cannot be discarded only because it is the evidence of interested witnesses. It is common knowledge that many times, in incidents such as the present incident, independent witnesses do not want to get involved. Therefore, we do not find that the prosecution

case has become unreliable because the prosecution has not examined any independent witnesses.

29. Before we analyse the evidence, we may note that in this incident number of persons from both sides are involved. In our opinion, in an incident of this type, it is impossible for all the witnesses to state everything in the same sequence. It is possible for one witness to see what the other witness has missed. We have purposely noted the injuries received by the prosecution witnesses. It is very clear that they were seriously injured. Therefore, it might not have been possible for them to take note of eveything when they were in pain. Some inconsistency would be inherent in their evidence. In our opinion, that would in fact make the prosecution story more reliable. There appears to be no tutoring of witnesses.

30. The complaint is lodged by PW-1 Gautam at 6.15 a.m. on 3/10/1985. He has stated that he is the brother of PW-18 Shirish. His brother PW-18 Shirish and his sister and mother were taking meals on 2/10/1985. At that time, accused 1 Vishnu, his sons accused 2 Vijay and accused 10 Sahebrao and accused 11 Sanjay, accused 12 Drupadabai and Nirmala came in front of the house and started abusing them. PW-18 Shirish went to call his brother. Accused 4 Bhagwan, accused 5 Sunil and accused 3 Ratan came there. He left the house to lodge a complaint. His mother also followed him. When he came near Ganpati Par, the accused

came there armed with sticks and knives and obstructed him. PW-8 Vasant also came there. Accused 2 Vijay and accused 11 Sanjay dealt blows of knife on the abdomen of PW-8 Vasant. When PW-1 Gautam intervened, accused 11 Sanjay and accused 2 Vijay also dealt blows of knife on right side of his chest and left side lumber region and costal region. When PW-8 Vasant fell down, accused 9 Kamalesh, accused 6 Suresh and accused 8 Kailash, accused 4 Bhagwan, accused 5 Sunil and accused 7 Anil came there running armed with sticks. They instigated the assailants to assault. At that time, deceased Ramdas was coming there. He was held by accused 1 Vishnu and accused 10 Sahebrao. Accused 2 Vijay and accused 11 Sanjay assaulted him with knife on stomach near village gate. Deceased Ramdas fell down near village gate. PW-10 Prakash came there. He was assaulted by accused 4 Bhagwan, accused 11 Sanjay, accused 2 Vijay and accused 1 Vishnu. Accused 4 Bhagwan gave blows with knife on the left side of stomach above waist of PW-10 Prakash. PW-10 Prakash fell down. At that time PW-18 Shirish came there. He was assaulted by accused 1 Vishnu, accused 2 Vijay, accused 10 Sahebrao and accused 11 Sanjay with sticks and knives. By the time the police came there. The accused ran away. The injured were removed to the dispensary at Pimpalgaon.

31. In his cross-examination, PW-1 Gautam has stated that his complaint came to be recorded at 10.30 a.m. on 3/10/1985. At 12.30 midnight deceased Ramdas died. This

witness was in the hospital for about 10 days. The evidence of this witness was attacked on the ground that in his police statement, he has not stated that accused 1 Vishnu and accused 10 Sahebrao held deceased Ramdas and that accused 2 Vijay dealt blows with knife on the stomach of deceased Ramdas. In our opinion, though this witness has, in the complaint not stated in so many words that accused 2 Vijay dealt blows with knife on the stomach of deceased Ramdas, he has made a statement to the effect that all the accused attacked deceased Ramdas. The omission to specifically assign the role to accused 2 Vijay, in our opinion, does not damage the prosecution case. There are other minor omissions in his statement. He has not stated in his police statement that accused 10 Sahebrao and accused 11 Sanjay assaulted PW-18 Shirish and PW-10 Prakash was assaulted by accused 4 Bhagwan, accused 11 Sanjay, accused 2 Vijay and accused 1 Vishnu and that they also assaulted PW-18 Shirish with sticks and knives. As already stated by us, these omissions would not affect the credibility of this witness. Considering the injuries received by him and the nature of the incident, it would not be proper to expect him to give all meticulous details in his police statement. We feel that on the basic story of the prosecution, this witness is consistent.

32. Similarly, PW-8 Vasant is also an injured witness. He is the father of deceased Ramdas. He has stated that at about 9.15 to 9.30 p.m., he returned to his house from

the village and came near Ganpati temple at village gate. Accused 1 Vishnu, accused 2 Vijay, accused 10 Sahebrao and accused 11 Sanjay were present there. They assaulted him. Accused 2 Vijay and accused 11 Sanjay had knives. Accused 1 Vishnu had a gupti and accused 10 Sahebrao had a knife. They gave knife blows on PW-8 Vasant. PW-1 Gautam was also assaulted. Accused 1 Vishnu, accused 2 Vijay, accused 10 Sahebrao and accused 11 Sanjay also assaulted deceased Ramdas with knife and gupti. No major omission has been brought on record in the evidence of this witness. It is true that he has said that he did not see where accused 2 Vijay and accused 11 Sanjay assaulted the deceased. But this witness was also seriously injured. We cannot loose sight of the fact that he is the father of deceased Ramdas. It is significant to note what he has stated in his evidence. He has stated that "Police recorded my statement when I was understanding little. This was after 8/10 days. In those days, I was understanding little. I was not in a position to understand or recollect who had assaulted." It appears that he was shaken up because of the loss of his son. We have already noted the nature of injuries suffered by him. He had to be operated upon on 3/10/1985. PW-16 Dr. Pawar has stated that the patient would not have survived if this operation was not performed. As per the medical statement, on 3/10/1985 his condition was very bad and his statement could not be recorded. Considering this, we find his evidence to be reliable so far as the substratum of the prosecution case

is concerned.

33. PW-10 Prakash is also an injured witness. At 8.30 p.m. on the day of the incident, he went to Milan Video centre to see a movie. At about 9.15 p.m. PW-18 Shirish came to call him. PW-18 Shirish told him that accused 1 Vishnu, accused 2 Vijay and accused 11 Sanjay and others were abusing the members of their family. He asked PW-18 Shirish to go ahead and told him that he would follow. He left Milan video centre for home. When he reached Ganpati temple near village gate, he found that deceased Ramdas was lying in an injured condition. When he went towards deceased Ramdas, accused 1 Vishnu, accused 2 Vijay, accused 10 Sahebrao and accused 11 Sanjay assaulted him. We find this witness to be a truthful witness. He has frankly stated that he came to the scene of offence after deceased Ramdas was attacked and he has stuck to this version. On this aspect, there are no omissions in his evidence. We find that he corroborates the evidence of PW-1 Gautam on the sequence of events and also so far as the attack on him by accused 2 Vijay and accused 11 Sanjay is concerned. It appears that PW-10 Prakash had stated before the police that he and PW-18 Shirish had started going home from Milan video centre, however, in the court, he has corrected this and stated that PW-18 Shirish went ahead. Barring this, there are no omissions in his evidence which would make him an unreliable witness. His evidence was attacked on the ground that he has stated that after the incident, he

went to the police station and at the police station, accused 2 Vijay, accused 11 Sanjay, accused 12 Drupadabai and her daughter were already there and he has admitted that his complaint was not recorded by the police. It was argued that this suggests that the genesis of the prosecution case was suppressed. This submission of the learned counsel must be rejected. We have already noted the injuries suffered by PW-10 Prakash. The injuries have been described by PW-7 Dr. Savkar. PW-10 Prakash himself had, in his evidence, stated that due to the assault, he had fainted. He has further stated that thereafter, anyhow by sitting intermittently he came to the police station. There was profuse bleeding from his injuries. Immediately, he was sent to the Civil Hospital, Nasik.

34. PW-11 Indubai has stated that after the incident, she went to the dispensary at Pimpalgaon. The injured were removed in two vehicles. PW-10 Prakash was taken in the vehicle along with accused 2 Vijay and accused 11 Sanjay to the Civil Hospital, Nasik. PW-10 Prakash had gone to the police station but, his complaint was not taken. PW-10 Prakash told her this after he was discharged from the hospital and came to Pimpalgaon. From the testimony of PW-11 Indubai, it appears that PW-10 Prakash had to be taken to the hospital along with accused 2 Vijay and accused 11 Sanjay. On account of the seriousness of the injury, his complaint could not be taken. It is also significant to note that on 6/10/1985

and 12/10/1985 statements of PW-8 Vasant and PW-10 Prakash could not be recorded because of their serious condition. This is evident from Ex-65 and Ex-66, which are the certificates issued by Nasik Civil Hospital. It will also be useful to refer to the evidence of PW-21 PSI Patil, who has stated that at about 12 midnight he received wireless message from Nasik that Ramdas had died in the hospital. PC Pathan gave this message and he instructed him to ask PW-19 ASI Gholap to record the complaint of any of the injured persons who was in a position to speak. This is also corroborated by the evidence of PW-15 PC Panpatil, who has confirmed that PW-21 PSI Patil instructed PC Pathan on phone to record the complaint of any of the injured, who was in a position to speak.

35. Similarly, PW-20 ASI Gurhale attached to Pimpalgaon police station has stated that on 3/10/1985, he recorded supplementary statements of the complainant, Shirish Gangurde and Sham Sudam Gangurde but, other injured witnesses were not in a position to speak and, therefore, he could not record their statements. On 4/10/1985, he recorded statements of some of the witnesses. On that day also, the injured persons were not in a position to speak. On 5/10/1985 also PW-10 Prakash and PW-8 Vasant were not in a position to speak. All this establishes that the prosecution witnesses had suffered serious injuries and were unable to speak. Even though PW-10 Prakash had gone to the police station, his statement

could not be recorded and from there, he had to be shifted to Nasik Civil Hospital. The criticism levelled against PW-10 Prakash and also the criticism as regards delay in recording the FIR and other statements must, therefore, be rejected.

36. PW-11 Indubai is the wife of PW-8 Vasant. In her evidence, she has stated that accused 1 Vishnu, accused 2 Vijay, accused 4 Bhagwan, accused 10 Sahebrao and accused 11 Sanjay came together and they assaulted PW-8 Vasant with knife, gupti, stick and iron bar. Accused 4 Bhagwan hit gupti on the stomach of PW-8 Vasant and accused 2 Vijay and accused 11 Sanjay dealt blows with knife on the stomach of PW-8 Vasant. PW-1 Gautam tried to intervene. He was also assaulted by accused 1 Vishnu, accused 2 Vijay, accused 4 Bhagwan, accused 10 Sahebrao and accused 11 Sanjay. PW-18 Shirish came there. He was also assaulted by the accused. He fell down. Thereafter, PW-10 Prakash came there. Accused 1 Vishnu, accused 2 Vijay, accused 4 Bhagwan and accused 11 Sanjay assaulted him. PW-10 Prakash also fell down. No material omissions have been brought out in her cross-examination. The omissions only pertain to the role of accused 4 Bhagwan with which we shall deal a little later. We find this witness to be a reliable witness.

37. PW-12 Sangita, the sister of PW-1 Gautam stated that accused 2 Vijay and accused 11 Sanjay gave knife blows on the stomach of PW-8 Vasant. PW-1 Gautam came there.

Accused 2 Vijay and accused 11 Sanjay assaulted him with knife. Accused 4 Bhagwan assaulted him with gupti on his stomach. At that stage, deceased Ramdas came there. Accused 2 Vijay and accused 11 Sanjay assaulted deceased Ramdas with knife. Accused 4 Bhagwan also assaulted him with gupti. Accused 1 Vishnu and accused 10 Sahebrao gave stick blows on him. At that time, PW-18 Shirish came there. Accused 2 Vijay and accused 11 Sanjay assaulted him with knife. Accused 4 Bhagwan also assaulted him with gupti. Then PW-10 Prakash also came there. Accused 2 Vijay and accused 11 Sanjay gave blows on his back and stomach with knife. Accused 4 Bhagwan gave blow with gupti on his head. He fell down. No material omissions have been brought out in the cross-examination of this witness. Omissions only pertain to the role of accused 4 Bhagwan, to which we shall advert a little later.

38. That takes us to the last material witness viz. PW-18 Shirish. In his evidence, this witness has stated that he along with his brothers and other members was in his house on the day of incident. The accused came there and started abusing them. Therefore, he went to call his brother PW-10 Prakash, who had gone to the Video Centre. He told his brother about the abuses. PW-10 Prakash asked him to go ahead. He came near village gate. He saw deceased Ramdas, PW-1 Gautam and PW-8 Vasant lying injured near village gate. Accused 1 Vishnu gave a stick blow on his head. Accused 2 Vijay and accused 11 Sanjay

gave knife blows on his stomach. He fell down. Thereafter, PW-10 Prakash came there. He was also assaulted with knife. However, the cross-examination of this witness indicates that he is an unreliable witness. It appears that he has given a totally contrary version to the police. He had stated before the police that he had seen the assault on deceased Ramdas, PW-1 Gautam and PW-8 Vasant. Therefore, it is very doubtful whether this witness has seen deceased Ramdas, PW-8 Vasant and PW-1 Gautam being assaulted at all. We find it very unsafe to rely on the evidence of this witness and, therefore, we propose to leave his evidence out of consideration. However, even if his evidence is left out, on the basis of rest of the evidence, conviction of accused 2 Vijay and 11 Sanjay can be upheld. We concur with the learned Sessions Judge that so far as attack on deceased Ramdas by accused 2 Vijay and accused 11 Sanjay is concerned, all the witnesses are consistent and, therefore, they have been rightly convicted. We may also note that at the instance of accused 2 Vijay and accused 11 Sanjay, knives have been discovered. These discoveries have been proved by panch witnesses as well as the Investigating Officer. We find no hesitation in relying on the evidence of discovery of weapons at the instance of accused 2 Vijay and accused 11 Sanjay. It is significant to note that the knife recovered at the instance of accused 2 was blood stained. It is also significant to note that the clothes of accused 2 Vijay and accused 11 Sanjay, which were seized under panchanama had blood

stains. It is true that no link can be established in this case between the blood stains found on the clothes of the accused and the blood group of the injured witnesses and deceased Ramdas. But, in our opinion, in the facts of this case, finding of blood stains on the clothes of these accused would be one of the circumstances against them.

39. So far as the injuries suffered by the accused are concerned, as compared to those suffered by the prosecution witnesses, they are minor. It is true that the prosecution has not offered any explanation about them but then it appears to us from the evidence adduced by the prosecution that they could be the result of the resistance offered by the prosecution witnesses who were seriously injured by the accused. There is no rule that in all cases where the prosecution offers no explanation of the injuries suffered by the accused, its case must fall to the ground. In **Laxmi Singh & Ors. v. State of Bihar (1976) 4 SCC 394**, while dealing with this question the Supreme Court has observed as under:

> "However there may be cases where non explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so cogent, so

independent and disinterested, so probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries".

In our opinion, apart from the fact that the injuries suffered by the accused are comparatively minor, in this case the evidence is consistent and credit-worthy and therefore non-explanation of the injuries by the prosecution does not affect the credibility of prosecution story.

40. We also find that the prosecution witnesses are consistent so far as injuries on PW-8 Vasant, PW-1 Gautam and PW-10 Prakash and PW-18 Shirish are concerned. Therefore, in our opinion, the conviction of accused 2 Vijay and accused 11 Sanjay as regards the injuries on these witnesses cannot be disturbed.

41. We, however, have reservations about the conviction of accused 4 Bhagwan. In our opinion, there is no cogent and consistent evidence to indicate the involvement of accused 4 Bhagwan. It is significant to note that whereas PW-1 Gautam has in his examination-in-chief stated that accused 4 Bhagwan used a knife, in his cross-examination, he has stated that accused 4 Bhagwan used knife as well as gupti. It is also significant to note that in the FIR, Ex-19, he has not stated that

accused 4 assaulted PW-10 Prakash. It is also significant to note that in the court, he has stated that accused 4 Bhagwan was armed with stick and he instigated the other accused to assault but that is not found in the FIR, Ex-19. Therefore, it is not clear whether accused 4 Bhagwan had used a knife, a gupti or a stick. It is also significant to note that when PW-8 Vasant was shown muddemal article 34, which is alleged to have been recovered at the instance of accused 4 Bhagwan, he stated that it was with accused 1 Vishnu and accused 4 Bhagwan. Similarly, PW-12 Sangita has not stated before the police that accused 2 was having a gupti and that he assaulted deceased Ramdas, PW-8 Vasant, PW-18 Shirish and PW-10 Prakash with gupti, though she has stated so in the court. Similarly, PW-18 Shirish has stated in the court that accused 4 Bhagwan had a gupti in his hand but, he has not stated so in his police statement. It is also pertinent to note that there were no blood stains on the clothes of accused 4 Bhagwan. There were no blood stains even on the gupti, which was allegedly recovered at his instance. We are, therefore, of the opinion that conviction of accused 4 Bhagwan deserves to be set aside.

42. It was argued that if the witnesses are found exaggerating on some aspects of the prosecution story leading to the acquittal of some of the accused, conviction of other accused cannot be based on such evidence. This conviction does not impress us, as here the prosecution witnesses are consistent on the role of

accused 2 Vijay and accused 11 Sanjay. Their evidence can be sifted and involvement of accused 2 Vijay and accused 11 Sanjay can be found out. There does not appear to be any attempt made by the prosecution to concoct a case and if there are any minor discrepancies they are entirely due to the manner in which the prosecution witnesses were attacked and the serious injuries received by them. Before we pass the final order, it would be necessary to quote the observations of the Supreme Court in **Sucha Singh and another v. State of Punjab (2003) 7 SCC 643**, which we had kept in mind while dealing with this appeal.

> "So even if a major portion of evidence is found to be deficient, in case residue is sufficient to prove the guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted. It is the duty of the court to separate the grain from the chaff.

> Where chaff can be separated from grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove the guilt of other accused persons. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto."

43. In our opinion, in this case, it is very easy to get to the truth. There is no question of reconstructing any new case. Above observations of the Supreme Court cover the present case completely. In the result we pass the following order:

O R D E R

"(a) Criminal Appeal No.490 of 1987 is allowed. Conviction and sentence of accused 4 Bhagwan Ratan Gangurde under the impugned judgment and order dated

7/5/1987 passed by the IInd Addl. Sessions Judge, Nasik, in Sessions Case No.19 of 1986 is quashed and set aside. Accused 4 Bhagwan Ratan Gangurde is ordered to be released forthwith unless otherwise required in some other case.

(b) Criminal Appeal No.470 of 1987 is dismissed. The conviction and sentence of accused 2 Vijay Vishnu Gangurde and accused 11 Sanjay Vishnu Gangurde under the impugned judgement and order dated 7/5/1987 passed by the IInd Addl. Sessions Judge, Nasik, in Sessions Case No.19 of 1986 is confirmed. Accused are on bail. Their bail bonds stand cancelled. They should surrender within eight weeks.

(c) Office is directed to send the writ of this order to Nasik Road Central Prison, immediately."

(SMT. RANJANA DESAI, J.)

(A.S. OKA, J.)